IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3828

JAMES J. CERVANTES,

Plaintiff-Appellant,

v.

LARRY JONES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 1520—**George M. Marovich**, *Judge.*

ARGUED MARCH 31, 1999—DECIDED AUGUST 13, 1999

Before POSNER, *Chief Judge*, and FLAUM and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Officer Larry Jones testified before an Illinois grand jury about evidence linking James Cervantes to the brutal murder of Cervantes' sometimes girlfriend, Sally Lavergne. After hearing the prosecutor's evidence, including Jones' testimony, the grand jury indicted Cervantes for first degree murder. Pending trial, Cervantes remained incarcerated for almost three years. A jury later acquitted him of the murder. Subsequently, Cervantes sued Jones under 42 U.S.C. § 1983 and Illinois law, alleging that Jones violated Cervantes' rights under the Fourth Amendment and Illinois law by testifying falsely before the grand jury. The district court granted

summary judgment for Jones, from which Cervantes appeals. We affirm.

I.

On July 20, 1992, a neighbor discovered the dead body of Sally Lavergne in Lavergne's apartment in South Elgin, Illinois. Lavergne's death resulted from multiple stab wounds from a butcher's knife in her chest and abdomen, although she also suffered severe skull fractures from a beating with a glass ashtray. There were no signs of forced entry, and the assailant fled without leaving any fingerprints. Cervantes became a suspect early in the investigation, as he was one of Lavergne's few friends. Elgin Deputy Chief of Police Larry Jones first interviewed Cervantes on July 20, and again with another officer present on July 25. Late at night on December 8, 1992, after discussing the murder with Cervantes at his apartment, Jones and two other officers took Cervantes to the police station for a polygraph examination. The examination indicated that Cervantes was untruthful when he denied killing Lavergne.

At approximately 5:00 a.m. on December 9, after the police finished questioning Cervantes, Jones drove him home. During the ride, Cervantes and Jones carried on a conversation in which Jones mentioned to Cervantes that it seemed he wanted to come clean. Cervantes' response to this statement is disputed, so we accept his version in the posture of this case. According to Cervantes, he responded: "If I confess to a crime that I did not commit, what would my defense be? I've got too much to lose." Jones tells a slightly different story, but the differences are important. Jones testified to the grand jury that Cervantes' response was: "Yes I would like to do that [confess to the crime]. But I've got too much to lose. If I admit I killed Sally, what would my defense be?" Cervantes contends that Jones also lied to the grand jury by

telling it that Cervantes admitted to lying about whether he was at his mother's house on the day of the murder,[1] that he has difficulty controlling his temper when he drinks, and that he had been drinking and smoking marijuana on the night of the murder.

After hearing the prosecutor's evidence, including Jones' version of events, the grand jury indicted Cervantes for Lavergne's murder. He was arrested and held in custody for almost three years while awaiting his trial for capital murder. On March 7, 1996, he was released from custody when a jury acquitted him. Cervantes sued under Illinois law and 42 U.S.C. § 1983, alleging that Jones violated his Fourth Amendment and Illinois common law rights by maliciously prosecuting him. Jones moved for summary judgment, arguing, among other things, that probable cause existed for the prosecution and that he enjoyed absolute immunity. The district court granted summary judgment for Jones, holding that Jones did not initiate or continue the prosecution of Cervantes, and that Jones was therefore entitled to absolute immunity. *Cervantes v. Jones*, 23 F. Supp. 2d 885, 890, 892 (N.D. Ill. 1998). Cervantes appeals, and we review the grant of summary judgment *de novo*. *DiGiore v. Ryan*, 172 F.3d 454, 459 (7th Cir. 1999).

II.

Section 1983 establishes a cause of action for persons deprived of constitutional rights by government officials acting under color of state law. 42 U.S.C. § 1983. Where a criminal defendant is prosecuted without reasonable grounds and was unlawfully incarcerated before his trial,

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[1] Both we and the parties are being imprecise in referring to the "day of the murder," or the "night of the murder." The police estimate that the murder occurred sometime between 9:45 p.m. on July 19, and 6:30 a.m. on July 20, 1992.

he may bring an action for malicious prosecution under § 1983, ostensibly for a violation of his Fourth Amendment rights. *Smart v. Board of Trustees of the Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994).[2]

To withstand summary judgment, a plaintiff alleging malicious prosecution under § 1983 must create a genuine issue of material fact as to each element of this constitutional tort. That is, he must provide some evidence that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) a state actor committed the malicious prosecution; and (3) he was deprived of liberty. *Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998); *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). Under Illinois law, the tort of malicious prosecution requires a showing that: (1) the plaintiff was subject to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings were terminated in the plaintiff's favor; and (5) there was an injury. *Rybicki*, 146 F.3d at 480-81; *Reed*, 77 F.3d at 1051.

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[2] In *Albright v. Oliver*, the Supreme Court held that an action for malicious prosecution cannot be based on substantive due process, but declined to decide whether the Fourth Amendment could serve as the basis for such suits. 510 U.S. 266, 275 (1994). As some judges have recognized, "the tort of malicious prosecution fits uneasily within the Fourth Amendment. That amendment proscribes unreasonable searches and seizures and has been held to prohibit arbitrary law-enforcement actions up until the time of arraignment. To justify a Fourth Amendment malicious prosecution claim, then, one has to extend the period of 'seizure' past arraignment." *Kerr v. Lyford*, 171 F.3d 330, 343 (5th Cir. 1999) (Jones, J., concurring); *see Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (rejecting the concept of a continuing seizure). For present purposes, however, we assume that Cervantes had a right under the Fourth Amendment to be free from malicious prosecution.

The district court granted summary judgment based on the "instituted or continued the proceedings maliciously" element and absolute immunity, which as we shall see, involve essentially the same question. Although the text of § 1983 does not admit of any immunities to suits brought under this section, the Supreme Court has held that these suits are subject to the immunities available at common law, so long as they are not in conflict with the purposes of § 1983. *Burns v. Reed*, 500 U.S. 478, 484 (1991); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). Accordingly, in order to protect prosecutors from vindictive lawsuits which might directly or indirectly impede their roles as public servants, prosecutors enjoy absolute immunity for activities which are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Similarly, to prevent the harassment of witnesses and to promote unrestrained testimony in criminal cases, the Supreme Court held that witnesses at trials are absolutely immune from suits under § 1983 for providing false testimony at trials. *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *see Jurgensen v. Haslinger*, 692 N.E.2d 347, 349 (Ill. App. Ct. 1998) (Illinois law). For the same reasons, this immunity extends to witnesses who commit perjury in pretrial proceedings. *Curtis v. Bembenek*, 48 F.3d 281, 285 (7th Cir. 1995) (police officer entitled to immunity for providing perjurious testimony in probable cause and suppression hearings).[3] Thus, a witness is absolutely immune from suits based on testimony given before a grand jury. *Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999); *Kincaid v. Eberle*, 712 F.2d 1023, 1024 (7th Cir. 1983) (per curiam).

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[3] Again, immunity is extended to these witnesses because "a witness who knows he may be subjected to costly and time-consuming civil litigation for offering testimony that he is unable to substantiate may consciously or otherwise shade his testimony in such a way as to limit potential liability." *Curtis*, 48 F.3d at 285 (citation and internal quotations omitted).

An exception to this wall of immunity for trial and pretrial testimony exists for a "complaining witness." Complaining witnesses were not absolutely immune from malicious prosecution suits at common law.[4] *Malley*, 475 U.S. at 340; *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997). "The common law made a subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution—complaining witnesses—did not enjoy immunity." *White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988). To qualify as a complaining witness (and thereby be disqualified from absolute immunity), a witness must play a sufficient role in initiating the prosecution.[5] *Id.* at 962. Of course, merely providing false testimony to a grand jury is not enough. *Id.* at 961. Rather, as we stated in *Curtis*, a complaining witness is one "'who actively instigated or encouraged the prosecution of the plaintiff.'" 48 F.3d at 286 (quoting *Anthony*, 955 F.2d at 1399 n.2); *see Ireland v. Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997) (no immunity for a "complaining witness who set the wheels of government in motion by instigating a legal action"); *Enlow*, 962 F.2d at 511 (a complaining witness is one who actively instigated,

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[4] The common law distinguished defamation actions from suits for malicious prosecution. All witnesses had immunity from defamation actions for testimony given in court, but complaining witnesses were still subject to lawsuits for malicious prosecution. *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 511 (5th Cir. 1992); *see Burns*, 500 U.S. at 501 (Scalia, J., concurring and dissenting). In a defamation action, the plaintiff seeks to hold the perjurious witness liable for the defamatory effects of his testimony; in a malicious prosecution claim, the plaintiff's complaint centers on the witness' role in initiating a meritless prosecution. *Enlow*, 962 F.2d at 511 n.29.

[5] A witness' status as a complaining witness is a question of fact. *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992).

encouraged, or perpetrated the prosecution). Thus, the term "complaining witness" is something of a misnomer, as the complainant need not testify as a witness so long as he played a significant role in initiating or procuring the prosecution. *Kalina v. Fletcher*, 118 S. Ct. 502, 512 (1997) (Scalia, J., concurring).

As we mentioned above, the district court found that Jones was not an initiator of the prosecution, and thus Cervantes failed to establish an essential element of his Illinois and federal claim and Jones was entitled to absolute immunity. 23 F. Supp. 2d at 890. Indeed, the record showed that while Jones was the one who suggested that the Kane County State's Attorney's Office obtain blood and hair samples from Cervantes, he never exhorted prosecutors to seek an indictment of Cervantes—at least not in so many words. According to the affidavit of the State's Attorney, John Barsanti, he (Barsanti) made the decision to prosecute Cervantes. But we note that Jones was the only witness to testify before the grand jury, and during that testimony he made allegedly false statements indicating that Cervantes essentially confessed to the murder. Jones also appeared to be the lead investigator and the police official who kept the investigation going. *See White*, 855 F.2d at 957, 962 (police officers may be complaining witnesses due to their testimony before a grand jury despite the fact that the prosecutor also played a significant role in advancing the prosecution); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988) ("the jury could find that the defendants systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision to prosecute"). After considering these and other facts (which we construe in the light most favorable to Cervantes), we think that Jones' role as the instigator of Cervantes' prosecution is a closer question than the district court suggested. As we said in *Jones*, "[i]f police officers have been instrumental in the plaintiff's contin-

ued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him." 856 F.2d at 994. Thus, because we may affirm a summary judgment on any ground for which there is adequate support in the record, we turn instead to the easier question of whether probable cause existed. *See EEOC v. North Knox Sch. Corp.*, 154 F.3d 744, 746 (7th Cir. 1998).

The existence of probable cause for the prosecution is a complete defense to an action for malicious prosecution under both Illinois and federal law. *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989); *Burghardt v. Remiyac*, 565 N.E.2d 1049, 1052 (Ill. App. Ct. 1991).[6] The determination of probable cause is a mixed question of law and fact.[7] *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998). But when facts sufficient to create probable cause are undisputed, probable cause is a question of law. *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1112 (7th Cir. 1997); *People v. Cooke*, 701 N.E.2d 526, 529 (Ill. App. Ct. 1998). Of course, a dispute concerning some facts relevant to the probable cause analysis does not preclude a finding of probable cause so long as the finding survives after adopting the plaintiff's version of the disputed facts for

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[6] The district court did not reach the issue of whether probable cause existed, but relied instead on the grounds mentioned above.

[7] A grand jury indictment is usually prima facie evidence of probable cause. *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir. 1994). But in construing the facts in the light most favorable to Cervantes, his allegation that the indictment was the product of Jones' perjury precludes us from considering the indictment in our probable cause analysis. A contrary rule could allow an indictment procured by lies to protect a witness from liability for his perjury. *See Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997).

which there is some support in the record. *Kerr*, 171 F.3d at 340 n.13; *Wolter v. Safeway Stores*, 153 F.2d 641, 642 (D.C. Cir. 1946). Probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Kerr*, 171 F.3d at 340 (footnote and internal quotations omitted); *see Frye v. O'Neill*, 520 N.E.2d 1233,1241 (Ill. App. Ct. 1988); *Kincaid v. Ames Dep't Stores, Inc.*, 670 N.E.2d 1103, 1109 (Ill. App. Ct. 1996). This analysis is based on " 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Humphrey*, 148 F.3d at 726 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). Importantly, the official's subjective belief as to the legal basis of the prosecution is irrelevant; the test for probable cause is an objective one. *Graham v. Connor*, 490 U.S. 386, 398 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances . . . ."); *Potts*, 121 F.3d at 1113; *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1247 (7th Cir. 1994).

In February 1993, the FBI's National Center for the Analysis of Violent Crime prepared a profile of Lavergne's killer based on the evidence gathered from the murder scene, the assailant's modus operandi, and common sense. While this isn't summary judgement evidence itself, it shows how a reasonable person might interpret the facts which were available to Jones. Using their experience with prior violent crimes, the FBI depicted the probable assailant in terms that are strikingly descriptive of Cervantes. The report described the probable assailant as having low socio-economic status, being at least thirty years of age, an alcohol or drug abuser, and someone who has a history of abusing those weaker than he, such as women or children. The FBI report also concluded (as a reasonable person could) that:

* The nature of the wounds, use of multiple weapons, and the knife being left in the victim, suggest person-

alized anger and is normally generated from someone who has an anger towards the victim for a longer period of time than the day of this murder. The offender came to the victim's apartment angry; however, because he used weapons of opportunity he may not have planned to go there to kill her. However, once at the victim's apartment, interaction between the victim and the offender escalated to murder.

* Because the offender took time to conduct some cleanup after the murder, it is likely he was familiar with the apartment, and had a higher degree of comfort in the apartment than might be expected from a stranger.

[FBI Rept. pp 2-3]

Cervantes' correlation with the profile started with his age, as Cervantes was in his early thirties. With respect to his socio-economic status, Cervantes was not affluent, as he was earning $9 per hour at the time he was arrested. There was no sign of a forced entry, which was consistent with the theory that the assailant was (like Cervantes) known to Lavergne or (again like Cervantes) had keys to Lavergne's apartment. Moreover, Cervantes' relationship with the victim was not a fleeting one, as they occasionally had sexual relations—despite the fact that Cervantes was married to another woman, Theresa Cervantes. Police interviews with Lavergne's co-workers, family, and friends revealed that the victim was often seen with a man who appeared to be Hispanic, and that Lavergne would let this man use her apartment, would give him rides to work, and may have loaned him money. Lavergne's neighbor—Lillian Peyton—told police that the Hispanic man's name was "James," and confirmed that James had a key to Lavergne's apartment.

With respect to the FBI's reasoning that the assailant was known to be violent and had festering anger towards the victim, a friend who lived with Lavergne during the

summer of 1991—Arlene Miller—informed Jones that Lavergne had complained that Cervantes had beaten her, and showed bruises from the beatings on her head, face, and arms. These beatings were also in accordance with the FBI's inference that the assailant had a history of abuse toward weaker people. Cervantes' violent nature was further confirmed by Sandra Skoty—Cervantes' former housemate and mother of his child—who told the police that Cervantes had difficulty controlling his temper when he drank alcohol, and that on one occasion when she was pregnant, Cervantes struck her. Theresa Cervantes and Penny Newman (Cervantes' girlfriend and housemate at the time of the murder) also told the police that Cervantes had struck them when he had been drinking, and Theresa Cervantes has a scar on her lip to prove it.

Cervantes was also a known alcoholic, consistent with the FBI's projection that the killer was an alcohol or drug abuser. Furthermore, Newman confirmed what the other women in Cervantes' life said: he was especially violent after drinking alcohol. Beyond Cervantes' correlation with the FBI's profile, numerous other facts cast suspicion on Cervantes. Marilene Gable—a friend of Penny Newman—told police that Newman told her on the night of Lavergne's murder that Newman and Cervantes were going over to James's friend Sally's house that evening. After the murder occurred, Newman told Gable that Lavergne was indeed the woman she and James had intended to visit that night, but that they never made the trip to Lavergne's apartment. Newman gave no reason for the sudden change of plans, other than that Cervantes was tired. As to particularized anger towards Lavergne, the owner of a restaurant that Lavergne frequented—Marguerite Lombardo—told police that Lavergne and an Hispanic man had been at the restaurant a few days prior to the murder, and after the Hispanic man left Lavergne confided to her that the man was "mad" at her because she told him that he could no longer use her apartment.

Furthermore, Cervantes admits that he met Lavergne at the restaurant around that time in order to invite her to dinner while his girlfriend was away. Additionally, Cervantes had an opportunity to commit the crime. Newman told police that she was not sure what time she went to bed the night of the murder and acknowledged that Cervantes might have left the house after she went to sleep, thus negating Cervantes' alibi. Also, a polygraph examination indicated that Cervantes was not being truthful when he denied killing Lavergne.[8] Similarly, Newman's polygraph results suggested that she was untruthful when she denied involvement in the murder or knowledge of who was involved.[9] Finally, another part

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[8] After a suppression hearing (not at issue here) before Kane County Circuit Court Judge James Doyle, Judge Doyle determined that the FBI agent who conducted Cervantes' polygraph examination committed perjury. Specifically, Agent Michael Hanna lied under oath at the suppression hearing when he told Judge Doyle that he was admitted to the Iowa bar. This fact was relevant to the suppression hearing because around the time of the polygraph examination, Cervantes suggested to Hanna that he might like to speak to a lawyer. In an effort to discourage this, Hanna told Cervantes that anything Cervantes wanted to discuss with a lawyer he could address to Hanna, as he was a lawyer. Of course, we find it disheartening, to say the least, that a federal agent would use lies in an attempt to convict a defendant in a capital murder case. But although Cervantes contends that Hanna's penchant for dishonesty tainted the polygraph results, our first analysis of probable cause is based on the information available at the time the prosecution was instituted. At that time, nobody had any reason to suspect that Hanna was dishonest. Regardless, probable cause to prosecute Cervantes existed even without the polygraph evidence.

[9] Cervantes argues that polygraph evidence cannot be considered in determining whether probable cause existed for prosecuting him. It is true that due to the suspected unreliability of polygraphs, Illinois courts have created a rule that the police, grand juries, and courts may not rely on polygraph evidence in deter-

(continued...)

of Cervantes' alibi—that he was at his mother's house sometime during the day of the murder—could not be corroborated. Furthermore, it might seem strange to a reasonable person that Cervantes picked that day to visit his mother, as his mother told police that she hadn't seen him in some time and didn't even know where he lived.[10]

Because probable cause is based on the totality of the circumstances, exculpatory evidence is also relevant. Although Lavergne's blood was found throughout the apartment, no analyzable fingerprints were found. But

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[9] (...continued)
mining whether probable cause exists. *People v. Allen*, 620 N.E.2d 1105, 1114 (Ill. App. Ct. 1993); *People v. McClellan*, 600 N.E.2d 407, 416 (Ill. App. Ct. 1992). But as a matter of federal law, polygraph results are one of many factors which may be used in determining whether, from an objective viewpoint, probable cause for an arrest existed under the Fourth Amendment. *Booker v. Ward*, 94 F.3d 1052, 1058 (7th Cir. 1996) (relying on polygraph results as one factor in finding that Illinois police officers had probable cause for an arrest as a matter of law); *see Kerr*, 171 F.3d at 341 (relying on polygraph evidence in determining that probable cause existed); *Herb Hallman Chevrolet v. Nash-Holmes*, 169 F.3d 636, 643 (9th Cir. 1999) (same); *Craig v. Singletary*, 127 F.3d 1030, 1046 (11th Cir. 1997) (indications of deceptiveness from polygraph may be one factor considered in probable cause analysis); *Johnson v. Schneiderheinz*, 102 F.3d 340, 342 (8th Cir. 1996) ("the negative polygraph exam results were not the only undisputed facts upon which probable cause could rest"); *Marx v. Gumbinner*, 905 F.2d 1503, 1506, 1507 (11th Cir. 1990); *Bennett v. City of Grand Prairie, Tex.*, 883 F.2d 400, 405-06 (5th Cir. 1989) (polygraph results, in conjunction with other evidence, may be used in determining whether probable cause exists to issue warrant). Therefore, this argument is without merit. Furthermore, as we mentioned above, the polygraph evidence was not essential to establishing probable cause.

[10] Cervantes argues that his mother certainly knew where he lived. But her actual knowledge is irrelevant; the question is what did she tell the police, and Cervantes offers no evidence that his mother did not make this statement to the police.

this by no means eliminates probable cause for suspecting Cervantes. Rather, using the rationale employed by the FBI report, the wiping away of fingerprints enhances the suspicion that the assailant was someone like Cervantes, who was familiar with the apartment, knew that nobody was likely to disturb him, and thus was comfortable taking his time to erase any traces of his presence.

More favorable to Cervantes was Lavergne's previous promiscuity and the fact that she once allowed another man to stay overnight in her apartment, thus raising the possibility that someone else committed the crime. Cervantes suggests that this possibility gets some support from the DNA which was extracted from blood found on a towel in Lavergne's bathroom, as it belonged to neither the victim nor Cervantes. Also in Cervantes' favor, there were no eyewitnesses or physical evidence linking Cervantes to the crime. At the same time, there were no eyewitnesses linking anyone else to the crime. Finally, there were Cervantes' own self-serving denials—the value of which was diminished by the polygraph results—and his uncorroborated alibi that he was at home the night of the murder. Perhaps some or all of these tidbits ultimately caused the jury not to find guilt beyond a reasonable doubt. But preliminarily, at least, most of the evidence pointed to Cervantes. He, after all, was the only man known to have had keys to Lavergne's apartment, and he still had one key after the murder. Also, he was the only man Lavergne ever mentioned to her sister Diane. In short, the totality of the facts in the record and the inferences derived from them would lead a reasonable person to the strong suspicion that Cervantes murdered Lavergne. Therefore, even without Jones' disputed testimony, probable cause existed to prosecute Cervantes for this crime. *Cf. Meehan v. Town of Plymouth*, 167 F.3d 85, 91 (1st Cir. 1999) (describing the circumstantial evidence that led to a finding of probable cause). Because the prosecution was supported by probable cause as a matter of law,

Jones has a complete defense to the malicious prosecution suit, and Cervantes is unable to establish an essential element of his Illinois law claim and his § 1983 claim based on the Fourth Amendment.[11] Therefore, the district court correctly granted summary judgment.[12]

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] Cervantes also complains that he was not given time to depose Jones and the prosecuting attorney, John Barsanti. In responding to Jones' motion for summary judgment, Cervantes argued to the district court that Barsanti's affidavit was irrelevant, but argued in the alternative that if it were relevant, ruling on the motion should be continued pursuant to Fed. R. Civ. P. 56(f), so that Cervantes could depose Jones and Barsanti. The district court did not abuse its discretion in addressing the summary judgment motion without granting Cervantes additional time for depositions. First, a request for additional time which is conditioned on whether the district court thinks a deposition would be fruitful is not a proper request for a continuance, as it requires the district judge to act as the plaintiff's agent and to advise him on what discovery he should pursue. Also, Cervantes' excuse for failing to depose Barsanti before the motion for summary judgment—that he refrained from taking depositions in order to foster an atmosphere conducive to settlement—is insufficient and borders on the foolish. *See Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996) (to obtain a continuance under Fed. R. Civ. P. 56(f) a party must (1) request a continuance, and (2) provide a sufficient reason for requesting the continuance).

[12] Because we affirm the summary judgment, Jones' motion to strike Cervantes' reply brief is moot.

[Dated February 25, 1998]

File No. 750204 SMP/els

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES CERVANTES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97 C 1520
	)	
LARRY JONES,	)	JUDGE MAROVICH
	)	
Defendant.	)	Magistrate Judge Ashman

AFFIDAVIT

I, JOHN A. BARSANTI, having been first duly sworn upon oath, depose and state that I have personal knowledge of the facts listed below and if called to testify could and would testify to the following:

1. I am an attorney, licensed to practice in the State of Illinois. I currently am the Chief of the Criminal Division of the Kane County State's Attorney's Office. At all times material and relevant hereto I was an assistant State's Attorney in Kane County, Illinois.

2. In February of 1993, my office was contacted by Larry Jones when he inquired into the possibility of seeking a warrant for hair and blood samples from James Cervantes in connection with the murder of Sally Lavergne.

3. In connection with Jones' inquiry into the possibility of obtaining hair and blood samples from James Cervantes, I independently reviewed the investigative reports into the murder of Sally Lavergne. After that review, I reached the conclusion that there was sufficient grounds to take the matter before the Grand Jury to seek an indictment of James Cervantes for the murder of Sally Lavergne.

4. At no time did Chief Jones ever request that an indictment be sought of James Cervantes, that decision I reached on my own.

5. At no time did Chief Jones ever suggest, cajole, urge, pressure or attempt to influence my decision to seek an indictment of James Cervantes.

6. My reasoning for seeking an indictment in this case was based upon my determination that the following facts and information developed during the course of the Lavergne murder investigation established more than sufficient grounds to believe that James Cervantes was responsible for the murder of Sally Lavergne:

(a) Sally Lavergne was found dead in her apartment at 370 South Ann Street in South Elgin, Illinois on the morning of July 20, 1992.

(b) A neighbor, Edgar Gates, who lived across the hall from the victim's apartment, heard Lavergne's alarm clock ringing inside her apartment. At approximately 6:30 a.m. he went to the victim's door, found it opened, and called the South Elgin police.

(c) The body of Sally Lavergne was found on a couch in her living room. Her night shirt

had been pulled up around her armpits and a butcher knife was found sticking in her chest by the officer who found her body.

(d) A *post-mortem* examination of Sally Lavergne's body was performed on July 21, 1992, by Dr. Larry Blum at the Kane County Morgue, and it was determined that she had died as a result of multiple stab wounds to her chest and abdomen. Several large lacerations were also noted in the victim's scalp and head areas. In addition, she also had suffered multiple blows to the left side of her face and head that resulted in numerous skull fractures. The skull fractures were caused by a blunt object and pieces of glass were found in the matted blood of her hair which suggested she was struck in the head with a heavy glass object. The victim also suffered several cuts on her hands, fingers and wrists that appeared to be defense wounds.

(e) A crime scene technician from the Illinois State Police, Michael Drawhorn, noted a large pooling of blood on the sofa near the victim's head and neck areas. One large and several small pieces of amber glass fragments were observed in this area that were consistent with the glass found in the victim's hair. Blood spatters were observed on the ceiling and on two walls. The blood spattered patterns appeared to radiate from the victim's body. A red-striped shirt soiled with blood was found in the apartment on the floor. Drops of

blood trailed through the kitchen into the bathroom. Blood stains were on the toilet and on paperback books on the floor and sink. There also appeared to be blood stains on the bathtub floor leading technician Drawhorn to believe that the person who murdered Sally Lavergne had washed there. The butcher knife found in the victim's chest was noted by Drawhorn to be similar in nature to other knives and utensils in the victim's kitchen. These facts suggest that the murderer did not plan the murder in advance since he used a weapon from the victim's apartment, that the murderer was familiar with the apartment and that the murder occurred in a fit of rage from the wounds on the victim and blood patterns.

(f) The initial interviews of Ms. Lavergne's neighbors and friends revealed that she routinely had dinner at Ollie's Restaurant in South Elgin, Illinois. Employees of the restaurant informed the police that she had left the restaurant on July 19, 1992 at approximately 9:40 p.m. Therefore, her murder had to have occurred sometime between 9:45 p.m. on the evening of July 19, 1992 and 6:30 a.m. on the morning of July 20, 1992.

(g) The *post-mortem* examination on the victim's body revealed the absence of any sperm in her vaginal area which indicated that the victim was not raped by her assailant.

(h) An inspection of Ms. Lavergne's apartment revealed no signs of a forced entry. This

suggested that Ms. Lavergne knew her assailant and allowed the assailant into her apartment.

(i) The initial interviews of the victim's coworkers, family and friends revealed that the victim was often seen with a man who appeared to be Hispanic. The investigation revealed that she let this man use her apartment, gave him rides to work and may have loaned him money.

(j) On July 20, 1992, Chief Jones interviewed a Lillian Peyton, who was a neighbor of the victim. Ms. Peyton informed Chief Jones that the Hispanic man's name was "James;" that "James'" sister had once lived on the third floor of the same building that the victim lived in, and that "James" had no driver's license due to a DUI conviction. Ms. Peyton further informed Chief Jones that the victim had told her that the victim had given "James" a key to her apartment and that the victim would sometimes get up early and drive "James" to the train station.

(k) On July 20, 1992, Chief Jones spoke to the victim's sister, Diane Burke. In that interview Ms. Burke stated that her sister did not have any friends, would keep to herself and would frequent Ollie's Restaurant. She also stated that her sister worked at Lee Wards Inc. in Elgin. Ms. Burke further stated that her sister had only spoke about one person to her. That person was a Hispanic man whose wife owned a resale shop in the Sunset Park Shopping Center in Elgin. She said her sister would occa-

sionally give rides and pick up that man at the train station.

(l) Chief Jones later that day checked at the Sunset Park Shopping Center and found a shop called the "Kiddie Korner Children's Resale." Chief Jones checked with the Elgin police and learned that the business owners were a James and Teresa Cervantes.

(m) Chief Jones then checked the driving record of James Cervantes and determined he had no valid driver's license and that Cervantes' sister, Cora, had once lived in the same building as the victim, Sally Lavergne.

(n) During the afternoon hours of July 20, 1992, Chief Jones and Investigator Paulsen of the South Elgin Police Department interviewed Helen Cervantes, the mother of James Cervantes. Mrs. Cervantes told them that James had separated from his wife, that he was living at an unknown location, and that Mrs. Cervantes had not seen her son for sometime.

(o) On July 20, 1992, Mr. Cervantes was living with another woman by the name of Penny Newman. On July 20, 1990 Chief Jones located James Cervantes and interviewed him at his apartment in the presence of Penny Newman. Mr. Cervantes informed Jones that he had known the victim for a number of years and that he and the victim, Sally Lavergne, were close friends. He stated that he at one time he had a key to the victim's apartment but

that he had returned the key to Ms. Lavergne in March, 1992. He admitted that when he was having marital problems, he would occasionally spend the night at the victim's apartment. Mr. Cervantes claims that he had not seen the victim for approximately two to three weeks. He also informed Chief Jones that he had visited his mother during the afternoon of July 19, 1992, done some shopping, and was home that evening with Ms. Newman and did not leave his house. Cervantes' statement concerning a visit to his mother the day before contradicted what Mrs. Cervantes told the investigators concerning when she had last seek her son.

(p) Deputy Chief Jones also interviewed Marguerite Lombardo on July 21, 1992. She is one of the owners of Ollie's Restaurant. Chief Jones was advised that the victim, Sally Lavergne, ate many of her meals at "Ollie's" and was a regular customer. At that time, she informed Chief Jones that the victim had been in the restaurant during the late afternoon of July 16, 1992 and met a male Hispanic subject who fit the description of James Cervantes. She had seen this gentleman in the restaurant before. The victim and the Hispanic male moved from the counter to a booth where they had a conversation. After the Hispanic male subject left the restaurant, Sally Lavergne told Ms. Lombardo that the man was mad at Ms. Lavergne because she had told him that he could not use her apartment anymore.

(q) Det. Sgt. David Jannusch of the St. Charles Police Dept. was advised during a July 23, 1992 interview of Arlene Miller that Ms. Miller and her boyfriend had temporarily stayed at the victim's apartment for two to three months during the summer of 1991. During that time, Ms. Miller came to know a male Hispanic named "James". Ms. Miller told Det. Jannusch that she and her boyfriend would leave the apartment so that James could spend the weekends there with Sally. Following at least one of the weekend visits, Ms. Miller informed Jannusch that she saw bruises on Sally Lavergne's head, face and arms and on one occasion she had a black eye. When questioned by Ms. Miller, Sally Lavergne told her that "James got mad".

(r) Sgt. Jannusch also interviewed a Sandra Skoty, who had once lived with James Cervantes in St. Charles, Illinois and had given birth to a child by Cervantes. Det. Jannusch was told that Cervantes drank heavily and had difficulty controlling his temper when he was intoxicated. On one occasion, when Cervantes was intoxicated, he struck and slapped Ms. Skoty while she was pregnant.

(s) On July 24, 1992, Deputy Chief Jones interviewed Teresa Cervantes, James Cervantes' estranged wife. At that time, Jones was told that on several occasions she confronted her husband about his drinking and that he struck her in the face on one occasion, leaving a scar on her lip.

(t) On July 25, 1992, Deputy Chief Jones and Det. Sgt. John Piccolin of the West Dundee Police Dept. again interviewed James Cervantes. During that interview he admitted that he and Sally Lavergne had been lovers and that he would frequently use her apartment for sexual rendezvous with the victim. In that interview Cervantes also indicated he last saw the victim on Wednesday, July 15, 1992, at Ollie's Restaurant when he stopped there to visit with Sally and to invite her to dinner on July 24, 1992, because his live-in girlfriend (Penny Newman) would be out of town. Cervantes also gave Chief Jones a set of keys which he had located which he thought may be to the victim's apartment. Subsequently, Chief Jones verified that one of the keys which Cervantes gave him fit the deadbolt to the victim's apartment. During that interview, Chief Jones drew a rough sketch of the victim's apartment and showed the sketch to Cervantes. Jones told Cervantes that there was a clean area near the couch where Ms. Lavergne's body was found. Jones stated that they could not determine what was possibly missing. Cervantes then told the investigators, "a big, brown glass ash tray, the kind you would see in a doctor's office, she had three of them in the apartment."

(u) On August 21, 1992, Sgt. Jannusch interviewed Marilene Gabel, who was a friend of Penny Newman, the then live-in girlfriend of James Cervantes. Ms. Gabel informed Det. Jannusch that she had been

visiting Ms. Newman at her apartment with Cervantes on July 19, 1992. Ms. Newman told Ms. Gabel that she and James Cervantes were going to visit a friend of Cervantes later that evening named "Sally." On July 21, 1992, Gabel had a telephone conversation with Penny Newman during which conversation Newman related that the police had questioned her and James Cervantes about the death of a woman named Sally. Gabel then inquired of Newman if this was the same person she and Cervantes were supposed to have visited on July 19, 1992. Newman replied that it was the same person, however, Ms. Newman told Gabel that she and Cervantes had not gone over to the victim's apartment.

(v) On November 28, 1992, several of the investigative officers interviewed Cervantes' girlfriend, Penny Newman, and learned that Ms. Newman had left Cervantes after Cervantes had become angry at her while intoxicated and beat her. During that interview, Newman informed the investigators that she was unsure what time she had gone to bed on the evening of July 19, 1992, and acknowledged that Cervantes could have left the house after she went to bed without her knowledge.

(w) A polygraph examination was administered to Penny Newman on the evening of December 8, 1992, by FBI Special Agent Edward T. Hamara. It was the conclusion of FBI Special Agent Hamara that Ms. Newman did not pass her polygraph exam-

ination. She was asked whether she was involved in any way with the death of Sally Lavergne and whether she knew for sure who caused the death of Ms. Lavergne. It was the opinion of Agent Hamara that her responses to those questions were indicative of deception. In a post-polygraph interview with FBI Agent Hamara on December 8, 1992, Ms. Newman informed him that James Cervantes was a violent person, especially after drinking, and that he had struck her at least three times during their relationship and that it was possible that Cervantes had left their apartment on the night that Sally Lavergne was murdered.

(x) On December 8, 1992, Chief Jones, Sgt. Jannusch and Det. Piccolin interviewed James Cervantes. At that time he admitted that he had difficulty controlling his temper when he drinks. He also admitted that he was drinking and smoking marijuana on the evening of July 19, 1992. He also admitted that he had physically abused many women in the past that he had been romantically involved with and admitted to having physically abused Sally Lavergne in the past, but did not believe his actions would have led to any marks or bruising. He also admitted that he may have lied to the police about visiting his mother on July 19, 1992, and about not having a key to the victim's apartment..

(y) On December 9, 1992, a polygraph examination was administered to James Cervan-

tes by FBI Agent Michael Hanna. It was the conclusion of Agent Hanna that Mrs. Cervantes' responses to questions concerning whether he was the person who caused the death of Sally Lavergne were indicative of deception. In a post-polygraph interview with FBI Special Agent Michael Hanna on December 9, 1992, James Cervantes admitted that he had been drinking and smoking pot on the day of Sally Lavergne's murder. He admitted to Agent Hanna that he had been smoking pot in a park near Sally Lavergne's residence the evening of the murder. He further admitted to Agent Hanna that he may have walked up to the victim's residence, but does not remember going inside. A blow-up of what appeared to be a bloody fingerprint taken from the underside of a toilet seat in the victim's apartment was shown to Cervantes by Agent Hanna and Cervantes admitted that the fingerprint might have been his. When questioned about this, Mr. Cervantes indicated he could not remember anything and that he wished to tell his story but with an attorney present. Agent Hanna then terminated the interview.

(z) The reports of FBI Agent Hanna and Hamara are attached hereto as Exhibit "A."

7. Attached to my affidavit as Exhibit "B" is a true and correct copy of the report of proceedings before the Kane County Grand Jury on March 16, 1993, following which an indictment was returned of James Cervantes for the murder of Sally Lavergne.

8. I am aware that James Cervantes is claiming that he did not make a certain statement to Chief Jones following his polygraph examination on December 9, 1992. That conversation took place in Chief Jones' car as Jones was driving Mr. Cervantes home. Chief Jones told Cervantes that he looked as if he wanted to tell someone what he had done, take whatever punishment there might be and get on with his life. Chief Jones reported that Cervantes told him that, he would like to, but that "I have too much to lose" and that, "if I admitted that I murdered Sally Lavergne what would my defense be?" Those statements were contained in the reports I reviewed. However, those statements did not play a role in my decision to seek an indictment of James Cervantes because in my view, those statements were equivocal in nature. I would have sought an indictment of Cervantes even if those statements were not made by James Cervantes following his polygraph examination.

9. Various officers and agents from the South Elgin Police Department, the FBI, the Illinois State Police Department, the St. Charles Police Department and the West Dundee Police Department participated in the investigation of the murder of Sally Lavergne. I could have selected any one of the agents or investigators from the various police departments or agencies who participated in the investigation to testify before the Grand Jury. I selected Larry Jones to testify because the murder occurred in South Elgin and he was the highest ranking officer from that department involved in the investigation and was familiar with all aspects of the investigation that had been completed to date. If, for any reason, he was unable to appear before the

Grand Jury, I could have requested another one of the other investigators to testify before the Grand Jury. I had a subpoena issued to Larry Jones to appear before the Grand Jury.

10 Following the indictment of James Cervantes, a motion to suppress was filed before the Honorable Judge James Doyle in the Circuit Court of Kane County. In that motion, Mr. Cervantes claimed that certain statements he made to FBI Agent Hanna and to Larry Jones were involuntary and were made in violation of his *Miranda* rights. Cervantes claimed that his statements were involuntary because they were the product of "deceit, trickery and promises of leniency." Cervantes claimed that FBI Agent Hanna told him that he did not need a lawyer because Hanna was a lawyer. Cervantes also claimed that Hanna offered to get him committed to a hospital rather than a prison. Agent Hanna denied making any promises of leniency.

11. Cervantes testified at the hearing on the motion to suppress. He denied making various statements to FBI Agent Hanna that Hanna claimed he made in the post-polygraph interview. He also denied telling Chief Jones that, "If I admitted I murdered Sally what would my defense be?" Cervantes claimed he told Chief Jones that "If I confess to a crime that I did not commit what would my defense be?"

12 One of the witnesses who testified at that hearing on the motion to suppress was Special Agent Michael Hanna of the FBI. Agent Hanna testified under oath that he graduated from law school at Creighton University in 1980 and testified that he was admitted to the Iowa bar later that year. At the conclusion of all the

testimony, Judge Doyle requested memoranda from each side and postponed argument.

13. After Agent Hanna had testified at the hearing on the motion to suppress, he contacted me and informed me that he was not in fact a lawyer. He advised me that he had taken the Iowa bar exam twice and had not passed. After receipt of that information, I disclosed to Judge Doyle the information FBI Agent Hanna had told me concerning his status as a lawyer and his attempts to pass the Iowa bar exam.

14. On February 25, 1994, Judge Doyle rendered his decision. He found specifically that on the evening that James Cervantes took the polygraph examination and made certain admissions to Agent Hanna in the post-polygraph interview and separately to Chief Jones, that Cervantes was not under arrest and he therefore concluded there was no *Miranda* violation.

15. Judge Doyle, however, concluded that Special Agent Hanna had deliberately lied on the witness stand and was not credible as a witness. He concluded that Hanna was a liar and did not believe Hanna's denials of leniency or his version of the statements Cervantes made in the post-polygraph interview in light of Cervantes' denial of those statements. Judge Doyle accordingly accepted Cervantes' version of that interview and then concluded that the State had failed to meet its burden to prove that Cervantes' statement to FBI Agent Hanna was voluntary and suppressed the statement which Cervantes made to Hanna in the post-polygraph interview. Judge Doyle went on to hold that Cervantes statement to Chief Jones was tainted by the involuntary nature of his statement to Hanna and also

suppressed Cervantes' statement to Chief Jones as "fruit of the poisonous tree." However, Judge Doyle in his ruling also made a specific finding that Chief Jones' testimony was credible.

16. The State then appealed Judge Doyle's decision. The Second Appellate District in a Rule 23 Order affirmed Judge Doyle's suppression of Cervantes' statements to FBI Agent Hanna. However, the Second Appellate District reversed Judge Doyle's order suppressing Cervantes' statement to Chief Jones. The Rule 23 Order of the Second Appellate District is attached hereto as Exhibit "C."

17. After receipt of the Second Appellate District's Rule 23 Order which was filed on March 13, 1995, I made the decision to continue the prosecution of James Cervantes. Chief Jones did not pressure, urge or attempt to influence my decision in any way. I was fully aware at that time that James Cervantes was disputing the conversation that he had with Chief Jones following his polygraph examination on the evening of December 9, 1992. As a result of that ruling on the motion to suppress, we were unable to introduce Cervantes' admission to FBI Agent Hanna that a bloody smudge of fingerprint found on the underside of a toilet seat in the victim's apartment might have been his. We were also unable to introduce his admission that he had been drinking and smoking pot in a park behind the victim's apartment building on the night of the murder and remembered walking up to the door of the victim's apartment building the evening Sally Lavergne was murdered.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ John A. Barsanti
JOHN A. BARSANTI

SUBSCRIBED and SWORN to before me
this 25th day of February , 1998.

/s/ Barbara R. Daly
NOTARY PUBLIC

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No. 252B-CG-88010

FBI Academy
Quantico, VA 22135
February 22, 1993

UNKNOWN SUBJECT;
SALLY A. LAVERGNE - VICTIM (DECEASED)
SOUTH ELGIN POLICE DEPARTMENT,
SOUTH ELGIN, ILLINOIS,
7/20/92
NCAVC - HOMICIDE
(CRIMINAL INVESTIGATIVE ANALYSIS)
OO: CHICAGO

The following consultation summary was prepared by Supervisory Special Agent (SSA) Stephen E. Etter, to summarize a consultation held at the National Center for the Analysis of Violent Crime (NCAVC), FBI Academy, Quantico, Virginia on September 22, 1992 with members of the South Elgin Illinois Task Force, Special Agent Marie Dyson of the Chicago FBI Office, and members of the NCAVC.

This analysis is based upon a review of the materials submitted, and the conclusions are the result of the knowledge drawn from the personal investigative experience, educational background, and research conducted by this analyst as well as by other NCAVC members. It is not a substitute for a thorough, well planned investigation and should not be considered all-inclusive. The analysis is based upon probabilities, not-

ing, however, that no two criminal acts or criminal personalities are exactly alike and, therefore, the offender at times may not fit the analysis in every category.

This analysis contains information of a confidential and sensitive nature and is provided for your investigative assistance. It should not be disseminated except to other criminal justice agencies with a legitimate investigative or prosecutive interest in this matter.

As a result of a consultation being held at the NCAVC, with case investigators present, all of the details and information regarding the victim, and the pathologists report will not be restated in this report. These areas will only be summarized. The Offender Traits and Characteristics, and Post-Offense Behavior Sections will list likely characteristics of the offender. These items will be a listing of the general characteristics discussed during the consultation on September 22, 1992.

VICTIMOLOGY AND WOUND SUMMARY

The victim was a 48-year old, white female who lived alone in an apartment in a low income, mixed racial neighborhood, consisting of whites, blacks, asians, and hispanics. The victim was divorced form her husband in 1981. She was a high school graduate and employed as an "order picker" in a local warehouse. The victim was known to allow homeless people to stay overnight in her apartment. She has been described as mentally slow, sexually promiscuous, and eccentric. Because of her lifestyle this victim would be viewed in a range of moderate to high in her risk level of becoming a victim of a violent crime.

The victim's body was discovered in her apartment by a neighbor who responded to the continuous ringing of the victim's alarm clock. The victim suffered from multiple skull fractures as a result of repeated blunt force strikes, as well as two stab wounds to the throat and five to her torso.

OFFENDER TRAITS AND CHARACTERISTICS

* White male (crimes of this nature are generally intraracial, however because of the racial mix in the neighborhood he could be racially different than the victim).

* Age level beginning at 30 and increasing to the age of those people the victim would normally associate with.

* History of violent emotional outbursts, volatile personality, inability to control emotions for any extended time period.

* The nature of the wounds, use of multiple weapons, and the knife being left in the victim, suggest personalized anger and is normally generated from someone who has had anger towards this victim for a longer period of time than the day of this murder. The offender may have had prior arguments with the victim. The offender came to the victim's apartment angry however, because he used weapons of opportunity he may not have planned to go there to kill her. However, once at the victim's apartment, interaction between the victim and offender escalated to murder.

* Because the offender took time to conduct some cleanup after the murder, it is likely he was familiar

with the apartment, and had a higher degree of comfort in the apartment than might be expected from a stranger.

* Likely has a poor employment history because of his volatile personality, and inability to accept criticism.

* Low socio-economic status, roughly consistent with that of the victim's.

* Alcohol and/or drug abuse may be present however, only minimally influenced the offenders acts during the murder, subsequent cleanup, and escape from the scene.

* Is unable to negotiate with people and his inability to control his temper is noticeable by those who know him. His history of abuse to others may be directed toward people weaker than he, i.e. women, children, etc.

* Arrest history would likely show domestic disturbances, and destruction of property type charges.

POST-OFFENSE BEHAVIOR

* This offender would not likely show remorse however, would be concerned about being discovered as the person responsible for the murder, consequently his behavior after the murder would be noticeably different to those who know him. He may have appeared agitated or restless, exhibited changes in his sleeping habits, increased or decreased his use of alcohol or drugs. He may have attempted to control his demeanor which others would describe as uncharacteristic, or "over-controlled."

* Because of the offender's prior association with the victim he may have been interviewed during the course of the investigation. He would initially appear very cooperative until he believed he had become a suspect, at which time he would become anxious and possibly look for a reason to leave the area. However, he would only leave if he had a "legitimate" reason, i.e. obtain another job, etc.

* Because of his inability to maintain his emotional control during times of stress, he is not likely to interject himself into this investigation.

* He would likely be very anxious for 24-48 hours after the murder and at any time the investigation focuses on him.

* Will rationalize the murder by convincing himself that the victim deserved it, or acted in a way which contributed to her death.

If your department desires further consultation of this case, contact SSA Stephen E. Etter, directly at the NCAVC, FBI Academy, Quantico, VA, (703) 640-1438, or Special Agent Marie L. Dyson, FBI Chicago, (312) 431-1333.